Filed 4/18/11 In re Staben CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re LEE STABEN, on Habeas Corpus.	E050528 (Super.Ct.Nos. CR37808 & RIC454914) OPINION

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Petition granted.

Rich Pfeiffer for Petitioner.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Assistant Attorney General, Anya M. Binsacca and Amanda Lloyd, Deputy Attorneys General, for Respondent.

INTRODUCTION

In this matter, we are called upon to determine, first, whether any evidence supports the decision by the Governor reversing a ruling of the Board of Parole Hearings (the Board) finding an inmate to be suitable for parole. The issue is potentially complicated by the fact that a court—in fact this court—has essentially mandated the finding of suitability.

Next, we must determine whether a decision of the Board fixing an inmate's term for the purpose of establishing a release date may be challenged as inconsistent with an earlier term-fixing decision. In the unique circumstances of this case, we answer the first question in the negative and the second in the affirmative. Accordingly, we grant relief.

STATEMENT OF THE CASE

If nothing else, it must be conceded that the efforts of petitioner Lee Staben to obtain a parole date provide a stark example of the inconsistency threatened when decisions are made by panels of two or three rotating parole commissioners[1]—not necessarily the same panel dealing with the same inmate in successive hearings—and when both the courts and the Governor have the power to reverse the Board's decisions.[2]

The facts concerning the offense are set out in detail in our unpublished opinion in an earlier case. (*In re Lee Staben* (May 14, 2009, E041712) [nonpub. opinion] (*Staben I*).)[3] The short version is that petitioner, then 19 years old, had a falling out with an older business partner and roommate over the latter's failure to pay rent. Sometime after the business partner/roommate and his girlfriend—one of the homicide victims in this case—

---

[1] Penal Code section 3041, subdivision (a), requires parole matters to be heard by a panel of "two or more" commissioners or deputy commissioners. Both the 2002 hearing and the 2009 hearings were held before two commissioners. (All further statutory references are to the Penal Code unless otherwise indicated.)

[2] Although we are aware of no instance in which the Governor has intervened in a denial of parole, section 3041.2 gives the Governor the power to overturn *either* grants *or* denials of parole.

[3] Rather than require the parties to undergo the expense of making additional copies of the relevant papers, we have chosen to take judicial notice of the contents of the file in *Staben I*, *supra*, E041712.

moved out, petitioner found that his home, which he shared with his girlfriend and their infant son, had been broken into and vandalized. Believing that the business partner was responsible, petitioner took a shotgun and drove to the trailer where the partner and his girlfriend were living. He banged on the door and shouted, but received no response. After angrily driving away, he returned to the trailer and fired one blast from his shotgun through the door. Tragically, the business partner and his girlfriend were inside, and the blast killed both the girlfriend—Donya Boyd[4]—and her unborn child. Petitioner was convicted of two counts of second degree murder in 1991 and sentenced to concurrent terms of 15 years to life for the murders; he also received a three-year enhancement for firearm use. (§§ 187, 12022.5.)

Petitioner had no previous criminal involvement either as an adult or a juvenile. While incarcerated, he has received a single "115" disciplinary notice for "pilferage."[5] In that matter, some cans of soda were missing from the canteen where petitioner then worked; and, although responsibility could not be determined, the prison authorities gave "115's" to all workers in the canteen. Otherwise—again in brief—his work reports have been consistently good to excellent, he has added vocational skills, he has participated in "self-help" and community outreach projects, and had, at the time of our earlier opinion,

---

[4] The name is sometimes spelled "Dawnya" in the record.

[5] A "115" is the report of a "serious rules violation," which usually results in loss of credits or privileges. Less serious matters receive a "128" or "counseling chrono." The informal terms derive from the form numbers used to report misconduct. (Cal. Code Regs., tit. 15, § 3312, subd. (a).)

solid parole plans. He also had strong support from what one cousin described as "a large family of productive and responsible members of society." (*Staben I, supra*, E041712.)

Following a parole hearing in December 2002, petitioner was found *suitable* for parole. The Governor reversed this decision. Petitioner filed petitions for habeas corpus in the superior court and in this court, but both the superior court and this court denied relief. (See *In re Lee Staben* (Dec. 17, 2003, E034563 [nonpub. opn.], summary denial.)

The next parole hearing was held in 2005 and, this time, the panel representing the Board found petitioner *unsuitable* for parole although nothing in his prison record suggested a regression. Petitioner again sought judicial review and, this time, this court granted relief in *Staben I, supra*, E041712.[6] After exhaustively reviewing the crime and petitioner's entire life and record, we held that the Board wrongly found him unsuitable for parole because "[t]here was no evidence predictive of undue risk [if petitioner were released] or any predictable risk at all." (*Staben I, supra*, E041712.) However, given the

[6] Adding to the prolongation of the matter is the fact that after we initially granted relief in November 2007, the People sought review and the Supreme Court issued a "grant and hold" order, as it was then considering two cases relating to parole standards. *Staben I* was eventually remanded to this court with directions to reconsider the matter in light of the decisions in those cases, *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*). Our opinion issued on May 14, 2009, reached the same conclusion as our first opinion, as we found that *Lawrence* and *Shaputis* clearly supported our decision.

length of time since the operative Board hearing, we remanded with directions to *grant a parole date* unless some evidence in his post-2005 history changed the equation.[7]

The Board accordingly held another hearing on September 24, 2009, and duly found petitioner suitable for parole. (We discuss the term imposed later in this opinion.) However, this time, the Governor again reversed the decision.

A.

The Governor's Reversal

In reversing, the Governor relied on three factors: 1) that the crime involved "multiple victims who were unarmed, unsuspecting, and in the privacy of their own home"; 2) that petitioner has "failed to obtain insight into the life offense or accept full responsibility for the murder" because he has "consistently claimed he did not believe anyone was inside of the trailer"; and 3) the "most recent mental-health evaluation raises additional concerns." We return to the third point later.

[7] The People argue that this order was improper under *In re Prather* (2010) 50 Cal.4th 238 (*Prather*), in which the Supreme Court held that an appellate court should not direct the Board to find an inmate suitable for parole unless events or circumstances subsequent to the previous hearing *taken alone* supported denial. However, our opinion in *Staben I* was final long before *Prather* was filed. The People did in fact seek review in *Staben I*, but review was denied on August 26, 2009, S173324. Hence, our order was binding on the Board. And, as petitioner points out, one panel member expressly stated on the record that the panel was "comfortable" with the decision "given all the variables in the situation." In any event, the holding of *Prather*—that the panel must be given the opportunity to consider not only newly developed evidence, but also that evidence *in conjunction with existing evidence* (*Prather*, at pp. 255-258) would not invalidate the proceedings here because there was *no* valid "new evidence" to consider.

The problem with the Governor's first two justifications is that they fly in the face of our express findings in our earlier opinion.[8] Of course, we acknowledged that petitioner was convicted (and properly so) of two counts of murder for the deaths of Donya Boyd and her unborn child. However, we also pointed out that petitioner "can have had no knowledge that his shot was likely to take a single life, let alone two. The fact that Boyd not only suffered fatal injuries, but that those injuries also proved fatal to her child, is tragic, but it does not increase petitioner's moral culpability or indicate that he is at increased risk for future violence." (*Staben I, supra,* E041712.) Nor can one point to the "unsuspecting" victims, given that petitioner had been shouting and pounding on the door of the trailer a few minutes earlier.

As far as petitioner's insight, or lack of same, this factor was relied upon by the Board in its 2005 decision. In our opinion, we noted that the Board had found that petitioner had not demonstrated "sufficient" insight or remorse, and we commented that "if this kind of 'quantity' analysis were permitted to stand, no decision could ever be challenged. How much remorse is 'enough?'" (*Staben I, supra,* E041712.) We noted that a 2001 mental health evaluation (the latest available in 2005) commented that petitioner's remorse "appeared genuine," and a 1998 evaluation found his insight "good." Although the 2001 report downgraded this to "fair" (without explanation, as we pointed out), we stated that "[t]he fact is that petitioner has always shown ample insight into his particular offense. He was angry and frightened and wanted to teach [the business partner] a

[8] In the 2005 proceedings, the Board also relied on the "egregious" nature of the crime and the fact that it involved multiple victims.

lesson . . . [p]etitoner was a law-abiding young family man who reacted foolishly and criminally to a perceived threat, and there is no indication that he does not understand this." (*Staben I*, *supra*, E041712.)

The Governor's final factor derives from the new psychological report, which the Board directed the authorities to prepare before the 2009 hearing.[9] To analyze the import of this evaluation, we must set out some points from previous evaluations dating from 1995, 1998, and 2001.

In 1995, after about five years of incarceration, a short initial report was prepared that indicated only that he had "psychiatrically improved moderately" (without indicating his original status), that due to the lack of psychopathology, "psychiatric opinion will not contribute to release decisions,"[10] and that "violence potential outside a controlled setting in the past is considered to have been less than average, or average, and at present is estimated to be decreased."[11]

---

[9] In 2005, the panel pointed out supposed deficiencies in the 2001 report and expressed concern over the missing information. Petitioner pointed out that only the Board could direct the preparation of a new report, and that it had not done so after the 2002 hearing. It appears that it is not in an inmate's power to develop evidence of mental-health improvement, but as this case demonstrates, it is always within the Board's power to attempt to develop evidence of deterioration. The 2007 report was dated after this court had issued an order to show cause in *Staben I*, *supra*, E041712, and by doing so signaled at least the potential for disagreement with the panel's denial of parole.

[10] Clearly an inaccurate prediction!

[11] We will not attempt to make sense of this other than that the evaluator apparently felt that petitioner did not then represent a significant current risk of violence.

In the 1998 report, the evaluator commented that petitioner "gives an excellent account of himself and presents his history with good insight." Again, no psychopathology of any kind was noted and the evaluator expressed the opinion that petitioner was "clearly a different individual now at the age of twenty-seven than he was at the age of nineteen." Finally, it was reported that "[h]is potential for violence within this community *as well as in the free community* are considered to be less than average at this time, *and to remain so in the future*."

The 2001 report again made no mental health diagnosis, noted that petitioner's insight was "fair" and that his "remorse appeared genuine." The evaluator considered him a "low risk of dangerousness" in a controlled setting, and that the "[p]rognosis for community living appears to be good."

In contrast to his cooperative manner during these evaluations, at the 2007 interview, petitioner declined to respond to questions on the advice of his attorney.[12] Nor does the report reflect that any psychological evaluative tests were performed. Nevertheless, the evaluator reached conclusions startlingly at odds with those of the previous evaluators.

This evaluator found that petitioner has a "Personality Disorder NOS with antisocial traits." In a truly remarkable explanation, the evaluator explained that, "A review of his records [without citation to anything in particular other than the life crime and minor

---

[12] As noted above, by this time his previous petition for relief was proceeding in this court with at least a good apparent chance of success. Thus, counsel presumably felt that he could only harm his chances by an ill-considered remark.

juvenile issues mentioned below] suggested that he has presented an enduring pattern of inner experiences[13] and behaviors, evident across a broad range of personal and social situations, that are experienced as problems in areas such as internal dysphoria, deficient or variable interpersonal functioning (failure to conform with societal norms, impulsivity, aggressiveness, disregard for safety of self or others, irresponsibility, blaming others for undesirable situations) and/or poor self-perception. Such a pattern has led to significant distress or impairment in various areas of functioning, and is suggestive of traits associated with a personality disorder. Due to the nature of personality traits, this diagnosis could remain with the inmate until he is able to demonstrate continued prosocial and unimpaired functioning for a protracted period of time without being under a supervised custodial living circumstance." Apparently, feeling the need to justify this, the evaluator noted a history of "truancy as well as alcohol, cannabis, amphetamine, LSD, and cocaine use"[14] and petitioner's minimal disciplinary history,[15] which was described as "antisocial

[13] We have no idea how the evaluator became privy to petitioner's "inner experiences."

[14] Petitioner told the evaluator in 2001 that he had a truancy problem his senior year of high school, but he did graduate. Petitioner had also admitted "experimenting" with marijuana in high school and using cocaine once. He told the 2001 evaluator that "he drank beer only occasionally because he never really liked the feeling of being drunk." We have been unable to find any references to amphetamines or LSD.

[15] In addition to the "pilferage" "115" described above, petitioner also received a "counseling chrono" relating to a "failure to comply with visiting rules and regulations" in 1998.

behavior." Petitioner was assigned a "GAF" (Global Assessment of Functioning) score of 74," due to the inmate's denial of difficulties in a variety of life areas."[16]

The evaluator then attempted to judge "[t]he prisoner's violence potential in the free community," as the Board had requested. The evaluator admitted that "the inmate does demonstrate psychological stability" but, based on petitioner's consistent denial of intent to harm anyone, stated that "[h]e appears to lack insight into his characterological problems that contributed to his criminal behavior." The evaluator expressed concern that if released, "the inmate would be exposed to a variety of situations in the community which may have led to his unstable and socially deviant lifestyle . . . there are a variety of possible destablilizing factors which increase his violence risk. *He denies any substance abuse problem but has participated [in] substance abuse treatment while incarcerated.* His ability to deal with the stress of interpersonal relationships in the community remains unclear."

The review ended by opining that petitioner represented a "[m]oderate" risk of violence. Conceding that he "has participated in a considerable amount of self-help activities," the evaluator nevertheless asserted that "he does not appear to have explored the commitment offense and come to terms with the underlying causes to an adequate

---

[16] Reluctant as we are to rely on "Wikipedia," for this tangential point it does not seem inappropriate. Drawing from the "Diagnostic and Statistical Manual of Mental Disorders," version DSM-IV-TR, this source lists a score of between 71-80 as reflecting "transient and expectable reactions to psycho-social stressors . . . ; no more than slight impairment in social, occupational, or school functioning . . . ." Thus, this score appears not to reflect major instability and is arguably inconsistent with the more pessimistic tone of the body of the report. (See Wikipedia.org Web site, <http://en.wikipedia.org/wiki/Global_Assessment_of_Functioning> [as of Apr. 18, 2011].)

degree . . . his apparent lack of insight suggests that he has had difficulty benefiting from his involvement in self-help."

To its credit, the Board panel did *not* seize on this report as new evidence or information supporting a continued denial of parole after our remand.[17] However, the Governor found the "elevated risk assessment . . . especially alarming" and quoted extensively from the report.

We first deal with the factors of "multiple victims" and "lack of insight." We initially analyzed the issue of one concerning the Governor's power, or authority, to rely on a factor that this court has held not to be applicable. However, it is unnecessary to reach this interesting issue[18] because the Governor's decision is vulnerable to the same objection we made to the Board's decision with respect to the 2005 decision in *Staben I.* Following the decisions in *Lawrence* and *Shaputis*, the only relevance of historical facts is whether

---

[17] The panel members expressed the view that the advice not to cooperate might have been misguided and might also have "slanted" the evaluator's views. Both members expressly said that they did not give much weight to the review or petitioner's declining to talk.

[18] However, we do note that it is well established that the courts may review the Governor's exercise of discretion under section 3041.2 and that in so doing may examine the factual basis for the Governor's decision. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 667, overruled on other grounds in *Howard v. Mendoza-Powers* (C.D. Cal. Jan. 25, 2010, CV-06-7938-JHN) 2010 U.S. Dist. LEXIS 24963; *In re Vasquez* (2009) 170 Cal.App.4th 370, 381.) By inescapable analogy, once the courts have expressed a view concerning a factual issue in a parole case, e.g., deeming it to be "A," the Governor may not later assert that it is "B" for the purposes of denying parole. If this were petitioner's initial resort to this court after a Governor's finding on the "multiple victims" issue, we would be free say that the Governor was wrong just as we said in *Staben I*, *supra*, E041712, that the Board was wrong. We do not understand how the Governor could ignore our explicit statement in *Staben I.*

they have *predictive value* concerning an inmate's future behavior. It cannot be said that the fact that petitioner's blind shot struck the pregnant Donya Boyd and also killed her unborn child has any predictive value greater than shown by *any* killing. And while "lack of insight" may, in an appropriate case, be evidence that an inmate has failed to come to terms with his offense and its causes and, thus, continues to represent a risk (*Shaputis, supra*, 44 Cal.4th at p. 1260; see also *In re Taplett* (2010) 188 Cal.App.4th 440, 450), here petitioner *does* have adequate insight and understanding of his offense. We so held in *Staben I*, and we find that the record simply does not support the Governor's contrary current conclusion—except insofar as it is based on the 2007 evaluation. The report is thus critical both to the "lack of insight" and "moderate risk of violence" factors.

We have no difficulty in concluding that the report is not entitled to any weight whatsoever. An expert's opinion must be supported by evidence, and that evidence must be of a type on which the expert may reasonably rely. (Evid. Code, § 801, subd. (b); *Geffcken v. D'Andrea* (2006) 137 Cal.App.4th 1298, 1311.) "'Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then *his conclusion has no evidentiary value*. [Citation.]'" (*Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 563, italics added.) In this case, the expert's findings that petitioner lacked insight, suffered from a personality disorder, and represented a moderate risk of reoffending was based upon nothing but conjecture. The evaluator appears to have simply compiled lists of factors or symptoms that would support a desired conclusion, and then assumed that petitioner either suffers from or

possesses them. The evaluator's imaginative recreation of petitioner's personal and social history, as well as his inner life, would be entertaining if the consequences were not so serious.

Furthermore, after burdening petitioner with the baggage of an "enduring pattern" of such experiences as "internal dysphoria," aggressiveness, irresponsibility, blaming others, and impulsivity, the evaluator concludes that his "diagnosis" "may" remain with petitioner until he demonstrates that he can live in a noncustodial setting for a "protracted" period of time—a condition petitioner can never satisfy as long as he is at the mercy of such evaluations. There is a term for this, and it is "Catch-22."

We will not belabor the point because our summary of the report on its own demonstrates the lack of foundation for the conclusions made. The Governor should not have found the report "especially alarming" with respect to petitioner, but rather with respect to the caliber of psychological evaluations in the corrections system as a whole. It does not support his decision to overturn the Board's decision granting parole.

We therefore conclude that none of the factors upon which the Governor relied to reverse the grant of parole is supported by any evidence. Accordingly, we will reinstate the grant of parole.

B.

Calculation of the Term and Release Date

As we noted above, petitioner was originally found suitable for parole in 2002 before the Governor reversed the grant of parole at that time. The "base term" for the killings was fixed at 180 months, which the commissioner announcing the decision—

Commissioner Bentley—described as "substantially mitigated," citing generally the circumstances we have discussed favoring the grant of parole. This term would have resulted in petitioner's release within a short time after the decision. However, after petitioner had achieved almost seven more years of discipline-free and affirmatively accomplished performance while incarcerated, the current panel set his base term at *336 months*, which would require him to remain in prison until September 2012.[19] This panel consisted of *two* commissioners, *one of whom was Commissioner Bentley*.

The People's response to this remarkable change is simply to rely on the fact that even the 336 month term is within the guidelines established by the regulations (Cal. Code Regs., tit. 15, § 2282) and was therefore a proper exercise of discretion. We do not disagree that the Board has substantial, almost unfettered discretion to fix a term so long as it suitably applies the regulatory guidelines. Nor do we quarrel with the proposition that a Board composed of A and B may reasonably reach a decision different from that reached by C and D—or even by A and C. That is simply the nature of discretion, which operates within a spectrum the outer limits of which are sometimes defined as the "bounds of reason." (See, e.g., *People v. Michael W.* (1995) 32 Cal.App.4th 1111, 1120.) However, that discretion must be exercised in accordance with the prohibition on vindictive sentencing, i.e., a sentence that increases a defendant's punishment in retribution (or even presumed retribution) for the defendant having successfully challenged the original

---

[19] In 2002, the panel applied the *mitigated* base term of 180 months and did not add more time. In 2008, it used the *middle* term of 212 months, added 96 months for the death of the fetus, and added 24 more months for the gun use.

sentence on appeal. (*North Carolina v. Pearce* (1969) 395 U.S. 711, 725 (*Pearce*), overruled on other grounds by *Alabama v. Smith* (1989) 490 U.S. 794 (dis. opn. of Marshall, J.); see also *Blackledge v. Perry* (1974) 417 U.S. 21, 27 [similarly prohibiting the prosecution from increasing a charge from a misdemeanor to a felony after a successful appeal].)

As petitioner points out, the Ninth Circuit has acknowledged that *Pearce* and the "vindictive prosecution" rules apply to parole decisions that reflect recomputation of an inmate's term. (*Nulph v. Cook* (9th Cir. 2003) 333 F.3d 1052, 1056; see also *Marshall v. Lansing* (3d Cir. 1988) 839 F.2d 933, 947-948.)[20] Under *Pearce* and subsequent decisions, a decision that increases the sentence is to be *presumed* vindictive if the reasons for the increase are not affirmatively apparent from the record, and it also appears that there is a "reasonable likelihood" that the change was due to vindictiveness. (*Pearce*, *supra*, 395 U.S. at pp. 725-726, fn. 20; *Alabama v. Smith*, *supra*, 490 U.S. at 799.)[21] The necessity for such a presumption arises from the obvious fact that "[t]he existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case." (*Pearce*, at p. 726, fn. 20.)

---

[20] The People state that *Pearce* and its ilk do not apply, but do not cite authority and do not discuss cases like *Nulph.*

[21] *Pearce* included two separate cases. The holding in one case, involving a guilty plea and entitled *Simpson v. Rice*, was overruled in *Alabama v. Smith*, *supra*, 490 U.S. at page 802. This ruling did not affect the discussion related to defendant Pearce upon which we rely.

How may the presumption be avoided? As noted above, if legitimate reasons are "apparent" or set out in the record, no presumption arises; we assume that the same would be true if the disinteredness of the decision maker(s) were in some manner indisputably established. *Pearce* restricted the permissible bases for a harsher sentence imposed upon a defendant who has successfully sought appellate relief to "objective information concerning identifiable conduct on the part of the defendant occurring *after* the time of the original sentencing proceeding."[22] (*Pearce*, *supra*, 395 U.S. at p. 726, italics added.) Later, this strict rule was modified to allow the sentencing authority to consider newly discovered information about the crime or the defendant, e.g., evidence showing that his criminal conduct was more culpable than had been supposed. (*Texas v. McCullough* (1986) 475 U.S. 134, 140; *Nulph v. Cook*, *supra*, 333 F.3d at p. 1059, fn. 3.)

Commissioner Bentley did attempt to explain her change of mind but merely stressed that, "There's no commitment on behalf of Panel members to stay with prior decisions." She explained her decision to vote against suitability in 2008 by referring vaguely to "concerns" raised by the Governor when he reversed the 2002 decision. Finally, Commissioner Bentley also pointed out the tragedy inherent in the death of an

---

[22] This approach was effectively that ordered by this court in *Staben I.* As the People point out, the decision in *Prather* holds that when an appellate court reverses a denial of parole, the Board has the power not only to consider newly occurring facts or circumstances in themselves, but also in relation to all other previous evidence. (*Prather*, *supra*, 50 Cal.4th at pp. 255-258.) However, the issue of vindictive prosecution is governed by the standards set out in *Pearce* and *Alabama v. Smith*. And as we noted above in footnote 7, the issue is essentially irrelevant because there *was* no valid "new evidence," which could be particularly illuminating when viewed in light of *existing* evidence.

unborn child. Nor did Commissioner Doyle articulate any reliance on new evidence or information, the panel simply elected to choose a more severe term based on the same facts available to the panel in 2002. Thus, no good reasons for the increase are apparent from the record as stated by the panel.

We also note that Commissioner Bentley was also a member of the panel in 2008 that denied parole. Thus, she at least could have felt personally stung by our criticisms of that panel's decision in *Staben I*.[23] Given the convoluted and inconsistent history of the case, the lack of any objective factors supporting the increase in punishment, and the continued involvement of at least one commissioner, we *do* think it reasonably likely, under *Alabama v. Smith*, that the change was punitive.

Accordingly, given the absence of stated reasons and the direct involvement of one commissioner in the 2002 hearing, we find that the *Pearce* presumption applies. At this point, it is plain that the People did not carry their burden (*Nulph v. Cook*, *supra*, 333 F.3d at p. 1058) of showing that objective facts—either newly discovered with respect to the crime, or relating to petitioner's recent conduct—can be adduced to explain the decision. As we have repeatedly noted, petitioner has now completed over 20 years of incarceration with a virtually flawless record. Nothing in his institutional performance or behavior since the 2005 hearing represents any reason to view his life crime more harshly than it was in

---

[23] We are particularly concerned to think that petitioner may have suffered not only due to his temerity in challenging the 2005 decision, but also as a result of any language in our *Staben I* opinion that the panel members may have found unnecessarily harsh. In retrospect, some of our language relating to our reluctance to return the matter to the Board may have been unwise. However, to the extent that we had concerns that petitioner would not receive a fair hearing, we believe they were justified.

2002. He has continued in "self-help" and religious support programs. His work and performance reports remain extremely positive, and his family continues to offer solid support. Other than the most recent psychological report, which we consider to be fatally flawed, there is no basis for finding that petitioner requires a longer period of incarceration than he did in 2002. Whether consciously or subconsciously vindictive, or "merely" hopelessly arbitrary, the decision here simply does not pass the "smell test." Petitioner has been ping-ponged around for long enough.

DISPOSITION

The petition for writ of habeas corpus is granted. The Governor's decision is reversed, and the Board of Parole Hearing's finding of suitability is reinstated. Respondent, through the Board of Parole Hearings is directed to recalculate petitioner's base term so that he will have completed it by a date no later than the date of the finality of this opinion, i.e., petitioner is to be placed on parole forthwith when the recalculation is completed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
Acting P.J.

We concur:

HOLLENHORST
J.

MILLER
J.